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Anti-Canonical Considerations

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Anti-Canonical Considerations

Edward J. Larson*

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I. INTRODUCTION

One of the most common adages is, “Learn from your mistakes.” Another is, “Everyone makes mistakes.” The trouble-plagued Iowa State football player Jason Berryman put these together with the self-descriptive line, “You can’t learn from your mistakes if you run away from them.”¹ The American champion of self-improvement Dale Carnegie proclaimed, “The successful man will profit from his mistakes and try again in a different way.”² Yet another common adage states, “They are only mistakes if you don’t learn from them.”

These timeless, if hackneyed, sentiments capture the purpose of this issue of the *Pepperdine Law Review*, which contains the published versions of papers delivered at the *Law Review’s Supreme Mistakes* symposium, held on April Fool’s Day, 2011, at Pepperdine University School of Law in Malibu, California. It is our contention that the United States Supreme Court is no different from the rest of us when it comes to mistakes—it too makes them. Yet when this supremely powerful institution makes mistakes,

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1. *Jason Berryman Quotes*, THINKEXIST.COM, http://thinkexist.com/quotes/Jason_Berryman/ (last visited Oct. 21, 2011).

2. *Dale Carnegie Training*, CARNEGIEWORLD.BLOGSPOT.COM (Feb. 6, 2008), <http://carnegieworld.blogspot.com/2008/02/successful-man-will-profit.html> (last visited Oct. 21, 2011).

they can have enormous consequences, as the articles contained in this issue show.³ If the Court is to learn from these mistakes and if American law is to profit from them then, as Berryman suggests, we should not run away from them. We need to understand them so that the Court is less likely to make them again. That is the purpose of this symposium issue.

To organize a symposium centered on this theme, members of the *Law Review*, particularly Janelle M. White and Blake McKay Edwards, worked with members of the faculty and dean's office to induce some of the nation's top constitutional law scholars and historians to Malibu to discuss five of the most maligned Supreme Court decisions of all time. From the outset, the concept was to have leading constitutional law experts each pick one case that could qualify as the Supreme Court's worst or most notorious decision of all time. Together, these so-called "Supreme Mistakes" would represent the symposium's anti-canon of American constitutional law. Given the limits of the symposium, we could invite only five outside speakers and five respondents. Most of the respondents were drawn from the Pepperdine faculty. The five outside speakers chose the cases; the respondents were limited by the choices of these outside speakers. In addition, we invited one of the nation's leading constitutional-law historians, G. Edward White, to provide his perspective on the overall issue. From the way this symposium issue of the *Review* was conceived, its success rests largely on those speakers.

These speakers then revised their comments for publication in this issue of the *Law Review*. The result is five main articles on single decisions, five short response articles, and one broad historical article. In these articles, we seek to learn from the Supreme Court's past mistakes about the limits of judicial power in the federal system and seek guidance about how the Court can anticipate and perhaps avert similar mistakes in the future. Working with the student editors of each piece, let me introduce the five cases and the articles about them.

3. See Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13 (2011); Paul Finkelman, *Coming to Terms with Dred Scott: A Response to Daniel A. Farber*, 39 PEPP. L. REV. 49 (2011); Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011); Barry P. McDonald, *A Reluctant Apology for Plessy: A Response to Akhil Amar*, 39 PEPP. L. REV. 91 (2011); Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101 (2011); Edward J. Larson, *Putting Buck v. Bell in Scientific and Historical Context: A Response to Victoria Nourse*, 39 PEPP. L. REV. 119 (2011); Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129 (2011); Donald Earl Childress III, *Redeeming Erie: A Response to Suzanna Sherry*, 39 PEPP. L. REV. 155 (2011); Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 163 (2011); Robert J. Pushaw, Jr., *Explaining Korematsu: A Response to Dean Chemerinsky*, 39 PEPP. L. REV. 173 (2011); G. Edward White, *Determining Notoriety in Supreme Court Decisions*, 39 PEPP. L. REV. 197 (2011).

II. THE CASES

A. *Dred Scott v. Sandford*⁴

In his article, Professor Daniel A. Farber condemns Chief Justice Roger Taney's opinion in *Dred Scott v. Sandford* for unnecessarily reaching out to brand blacks as eternally unequal to the legal status of whites and to bar any effort by Congress to control the spread of slavery into the territories.⁵ Farber charges that Taney's decision represented an extraordinary case of presidential tampering with the judicial process and a breakdown in fair procedure within the Court itself.⁶ Despite the absurdity of Taney's reasoning, his opinion created "constitutional tropes of racism, narrowing of federal power, and protection of property" that remained dominant in constitutional law for another seventy-five years.⁷ *Dred Scott* "did nothing to inject common sense or balance into the national debate" leading to the Civil War, Farber writes,⁸ but instead it injected fuel on the fire by settling the issue clearly on the side of the South. According to Farber, "[N]ever has a judge gambled so badly for such high stakes."⁹ Farber concludes that no other Supreme Court decision "contrived to fail across so many different dimensions—as an exercise in judicial overreaching, intellectual dishonesty, and disastrous statesmanship—and to do so in the defense of an institution whose very existence was a violation of human rights."¹⁰

Professor Paul Finkelman responds to Farber's assertions by placing *Dred Scott* in its historical and constitutional context.¹¹ The decision was constitutional under a regime that, prior to the Thirteenth, Fourteenth, and Fifteenth Amendments, legalized and protected slavery.¹² Finkelman recognizes that while modern public sentiment rejects as outmoded any past decision promoting slavery, Justice Taney's majority opinion in *Dred Scott* sprung from legislative, political, and common law grounds that undermine

4. 60 U.S. (19 How.) 393 (1857).

5. Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13, 14 (2011).

6. *Id.* at 15.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 38.

11. See generally Paul Finkelman, *Coming to Terms with Dred Scott: A Response to Daniel A. Farber*, 39 PEPP. L. REV. 49 (2011).

12. *Id.* at 51–53.

Farber's reasons for demonizing it.¹³ Although *Dred Scott* came at the apex of a long, nascent tension within the federal territories over how to resolve the slavery issue, Farber believes we as modern Americans do not hate the opinion because it was a poorly-reasoned decision of a racist judge that sparked the Civil War; we hate the opinion largely because we are embarrassed by (and often refuse to acknowledge) what America was in the antebellum period.¹⁴

B. *Plessy v. Ferguson*¹⁵

In his article, which is an edited transcription of his symposium remarks, Professor Akhil Amar depicts *Plessy v. Ferguson* as one of the most reviled United States Supreme Court decisions of all time—and tries to explain why that is so.¹⁶ Indeed, he describes *Plessy* as a central case in an anti- or counter-canon of American law.¹⁷ This anti-canon, Amar notes, is made up of judicial decisions that stand in opposition to widely shared American values, such as equal opportunity and individual liberty.¹⁸ *Plessy*, he states, is such a decision.¹⁹ In his remarks, Amar discusses Justice John Harlan's lone dissent in *Plessy*, noting that Harlan understood the Fourteenth Amendment to the Constitution to mean that all citizens are equal under the law, but that the majority opinion in *Plessy* allowed for unequal treatment of a racial minority under the law.²⁰ Professor Amar argues that Harlan had an integrationist vision at that time, which is one that we eventually see reflected in various canonic documents of American history and law, such as Martin Luther King Jr.'s "I Have a Dream" speech and *Brown v. Board of Education*.²¹

In his response, Professor Barry P. McDonald argues that *Plessy* was virtually inevitable when placed in the historical and legal context of the late 1800s.²² He writes that prevailing public opinion and social conditions at the time would not have supported official desegregation in the South.²³ Indeed, he adds, race relations were deteriorating dramatically in both the South and the North.²⁴ At the time of *Plessy*, McDonald notes, existing

13. *Id.* at 53.

14. *Id.* at 72–73.

15. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

16. Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011).

17. *Id.*

18. *Id.* at 76.

19. *Id.*

20. *Id.* at 82, 86.

21. *Id.* at 84–88.

22. Barry P. McDonald, *A Reluctant Apology for Plessy: A Response to Akhil Amar*, 39 PEPP. L. REV. 91, 92–93 (2011).

23. *Id.* at 93.

24. *Id.* at 93–95.

Supreme Court precedent was not particularly protective of minority rights and lower court precedent of the day actively supported racial segregation in public facilities.²⁵ He observes that the Court had no means, such as the purse or a police force, to enforce a progressive decision that was unpopular with the public and not supported by either the ruling state or federal administrations.²⁶ In closing, McDonald concedes that while the *Plessy* decision seems inevitable when placed in context, Justice Henry Billings Brown's opinion was still written in an insensitive and offensive way that should not be excused.²⁷

C. *Buck v. Bell*²⁸

Professor Victoria Nourse selected *Buck v. Bell* as the Court's worst decision. By upholding Virginia's compulsory sterilization law in 1927, she asserts that the Court reinvigorated the nation's eugenics movement, leading to the forced sterilization of thousands of Americans.²⁹ According to Nourse, *Buck* is a constitutional tragedy because it so easily could have come out the other way.³⁰ At the time, many state courts were finding eugenic sterilization statutes unconstitutional, and the plain language of the Equal Protection Clause suggested that such laws were invalid.³¹ To understand *Buck*, Nourse suggests that we must look to an older era of constitutional jurisprudence where the state police power was seen as supreme, and even the most sacred individual rights could be sacrificed in the name of the health, safety, and welfare of society.³² Nourse argues that this era of constitutional law was fundamentally at odds with the plain meaning of the Fourteenth Amendment, which, at the very least, forbids government recognition of a born aristocracy.³³

In response, I argue that, at the time the Supreme Court decided *Buck* in 1927, eugenics was on the rise, not the decline.³⁴ The American scientific and medical community broadly backed eugenic remedies for various forms

25. *Id.* at 97–98.

26. *Id.* at 93.

27. *Id.* at 98–99.

28. 274 U.S. 200 (1927).

29. Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 103 (2011).

30. *Id.* at 102–03.

31. *Id.* at 102.

32. *Id.* at 109–10, nn.63, 65.

33. *Id.* at 116.

34. Edward J. Larson, *Putting Buck v. Bell in Scientific and Historical Context: A Response to Victoria Nourse*, 39 PEPP. L. REV. 119, 120 (2011).

of mental illness and retardation.³⁵ Legislatures, lawyers, and jurists took their cue from this scientific and medical consensus.³⁶ Absent any question that the statute at issue in *Buck* was validly passed and that due process was provided for the persons subject to its reach, the law should have withstood constitutional challenge.³⁷ The tragedy of *Buck*, I charge, was that Carrie Buck never received the due process guaranteed under Virginia's eugenic sterilization statute and that neither her lawyers nor the courts protected her from a flagrant violation of her basic rights.³⁸ Had due process been provided in this and other instances, while eugenics would still have been a scientific and medical mistake, it would not have been a legal one.

E. *Erie Railroad Co. v. Tompkins*³⁹

Professor Suzanna Sherry's article begins by setting forth criteria for assessing the worst Supreme Court decisions in history: (1) it must be wrong; (2) it must not be explainable as a product of its time; and (3) it must have lasting detrimental effects.⁴⁰ Sherry argues that while all of the other cases discussed in this symposium issue may be wrong, *Erie Railroad Co. v. Tompkins* was worse than the others for two reasons.⁴¹ First, unlike the others, *Erie* was not explainable or excusable given its historical context.⁴² Second, by shifting choice of law principles in federal courts, *Erie* has had a gravely deleterious impact on jurisprudence.⁴³ In her article, Sherry discusses how the Court misinterpreted the Rules of Decision Act⁴⁴ and contends that the Court and commentators seriously exaggerated the social and political defects of prior practice under *Swift v. Tyson*.⁴⁵ In doing so, she explores the confusion surrounding the Court's controversial basis for finding that *Swift* was unconstitutional.⁴⁶

Professor Donald Earl Childress's response to Professor Sherry's article redeems *Erie* by focusing on what the decision teaches us about federalism.⁴⁷ The article begins by recognizing that the *Erie* decision

35. *Id.* at 121–22.

36. *Id.* at 122–24.

37. *Id.* at 128.

38. *Id.* at 119 n.3.

39. 304 U.S. 64 (1938).

40. Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 130 (2011).

41. *Id.* at 130–32.

42. *Id.* at 147–49.

43. *Id.* at 149–52.

44. *Id.* at 133–37.

45. *Id.* at 137–38.

46. *Id.* at 142–47.

47. Donald Earl Childress III, *Redeeming Erie: A Response to Suzanna Sherry*, 39 PEPP. L. REV. 155, 157–58 (2011).

appears to “read more like an *ex post* rationalization than an application of well-settled principles of law.”⁴⁸ The article points out that in application, however, there are rarely cases where the courts are confounded as to the right outcome.⁴⁹ Problems arise when state law is unsettled or in the rare occasions where the line between substantive and procedural law is blurred.⁵⁰ The article concludes by stating that although *Erie* may have been wrongly decided, it is redeemable by recognizing that it forces courts to take a step back and focus on sensitive federal and state issues.⁵¹

E. *Korematsu v. United States*⁵²

In the main article, Dean Erwin Chemerinsky makes three points. First, he establishes the following criteria for assessing Supreme Court decisions: (1) social impact;⁵³ (2) quality of the judgment’s crafting and reasoning;⁵⁴ and (3) impact of the decision on the development of the law.⁵⁵ Next, he applies these criteria to *Korematsu v. United States* and finds that *Korematsu* stands as one of the worst Supreme Court decisions.⁵⁶ Chemerinsky highlights how 110,000 Japanese-Americans were unfairly incarcerated without due process or compensation.⁵⁷ In addition, Chemerinsky emphasizes how the Court erred in focusing solely on the ends that the government was seeking to achieve while ignoring the means.⁵⁸ Chemerinsky also explains how this pattern of restricting liberty in times of crisis existed throughout American history.⁵⁹ Chemerinsky concludes this article by sharing a few important lessons: (1) no individual should ever be detained by the government without individualized suspicion that he or she has committed a crime;⁶⁰ (2) the importance of remembering the role of race

48. *Id.* at 157.

49. *Id.*

50. *Id.* at 159.

51. *Id.* at 161.

52. 323 U.S. 214 (1944).

53. Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 163, 164–65 (2011).

54. *Id.* at 165.

55. *Id.* at 166.

56. *Id.* at 166–70.

57. *Id.* at 166.

58. *Id.* at 168.

59. *Id.* at 169–70.

60. *Id.* at 170–71.

in decisions by government in American history;⁶¹ and (3) the Constitution should not be suspended in times of war or crisis.⁶²

In response to Dean Chemerinsky's characterization of *Korematsu* as one of the worst Supreme Court decisions of all time and in spite of the widespread criticism of the decision, Professor Robert J. Pushaw Jr. explains the Court's holding in light of its historical context.⁶³ Instead of Chemerinsky's three criteria analysis, Pushaw proposes a two-step "Neo-Federalist" analysis⁶⁴ for assessing what makes a Supreme Court decision a bad one.⁶⁵ In particular, Pushaw addresses the inapplicability of Chemerinsky's criteria to decisions involving military action⁶⁶ and argues that *Korematsu* can be viewed as in line with other precedent recognizing the deference given to presidents during times of military crisis.⁶⁷

F. Historical Perspective

Professor G. Edward White notes in his historical essay, "The notorious decision ends up being one that is characterized as transcendently mistaken. Not only is it on the 'wrong' side of history, it gets no discount for the historical context in which it was decided."⁶⁸ He observes that notorious decisions like *Dred Scott* and *Korematsu* "share pernicious outcomes, a questionable institutional stance on the part of the Court, flawed legal reasoning, and, over time, a location on the wrong side of history."⁶⁹ White suggests that the first three of these criteria are heavily dependent on the fourth and stresses that true notoriety only seems to affix itself to cases where "foundational wrongheadedness and transparently defective reasoning" were identified by contemporaries of the decision.⁷⁰ In this respect, Professor White contrasts *Lochner v. New York*⁷¹ with *Dred Scott* and *Korematsu* by observing that *Lochner* may have escaped being chosen as one of the worst decisions in part because it was not derided by contemporaries, and obtained notoriety only when it was overturned during a

61. *Id.* at 171–72.

62. *Id.* at 172.

63. Robert J. Pushaw, Jr., *Explaining Korematsu: A Response to Dean Chemerinsky*, 39 PEPP. L. REV. 173 (2011).

64. *Id.* at 176. For a detailed description and defense of the Neo-Federalist approach, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 397–99, 454, 470–72 (1996).

65. Pushaw, *supra* note 63, at 176.

66. *Id.* at 180–83.

67. *Id.* at 183–94.

68. G. Edward White, *Determining Notoriety in Supreme Court Decisions*, 39 PEPP. L. REV. 197, 198 (2011).

69. *Id.* at 204.

70. *Id.* at 211–12.

71. 198 U.S. 45 (1905).

later era.⁷² Finally, Professor White applies his framework to *United States v. Carolene Products Co.*,⁷³ acknowledging that few people would label it as notorious, and finds that despite its seemingly unsupported reversal of precedent, the decision is historically resonant with the mainstream political and economic attitudes of Americans in the 1930s—showing that historical discounting seems to increase the stature of the decision.⁷⁴

III. CONCLUSIONS

By including *Lochner* along with *Dred Scott* and the other decisions subject to current censure, Professor White illustrates the difficulty of establishing a lasting anti-canon of American constitutional law. When I was in law school in the 1970s, any listing of Supreme Court mistakes surely would have included *Lochner*. This point is underscored by Professor Jamal Greene's recent survey of fifty-four U.S. law review articles from the past quarter century that make reference to anti-canonical legal texts: he found that only four Supreme Court decisions were listed as "anticanon or antiprecedent" by more than two authors.⁷⁵ Remember that Greene's survey covers a period reaching back nearly to my law school days and does not necessarily capture current opinion.⁷⁶ Of the four notorious decisions identified by Greene's survey, only *Lochner* is not on today's docket.⁷⁷ Why not? Has it fallen into favor? Unlike the characters in Dante's *Inferno*, who are doomed to remain there forever, can the decisions in what Akhil Amar has characterized as "the lowest circle of constitutional hell" change over time?⁷⁸ Are we really talking about a constitutional purgatory rather than eternal damnation? Could grace abound even to the chief of sinners? Points raised in the response articles suggest that the answer in many cases could be "yes" on all counts. *Lochner*'s absence does so as well.

During the mid-twentieth century, *Lochner* was despised for many reasons. In that 1905 decision, a bare majority of the Supreme Court struck down a popular state statute limiting persons employed as bakers (but not self-employed bakers) to working no more than sixty hours per week.⁷⁹ The

72. White, *supra* note 68, at 210–12.

73. 304 U.S. 144 (1938).

74. White, *supra* note 68, at 215–21.

75. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776488.

76. *Id.*

77. *Id.*

78. *Id.* (manuscript at 7) (on file with *Harvard Law Review*).

79. *Lochner v. New York*, 198 U.S. 45 (1905).

law, the Court declared, violated employers' and employees' liberty of contract under the Fourteenth Amendment's Due Process Clause.⁸⁰ As such, *Lochner* came to represent the extension of substantive due process to an economic right not enumerated in the Constitution.⁸¹ *Lochner* was not the first or last decision to do so, however. It gained infamy mostly because of Justice Oliver Wendell Holmes's memorable dissent, which cast the majority's ruling as a damnable act of anti-democratic judicial activism in support of anti-progressive Gilded Age business interests.⁸² "I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion," Holmes declared.⁸³ "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."⁸⁴ Explaining the decision's anti-canonical status, Yale constitutional scholar Bruce Ackerman wrote in 1991, "For the overwhelming majority of today's Americans, *Lochner*'s constitutional denunciation of a maximum hours law, limiting bakers to a sixty (!) hour workweek, speaks in an alien voice."⁸⁵

The absence of *Lochner* from today's program suggests that academic opinion on even that much-reviled decision may be undergoing some revision. At least two reasons spring to mind. First, at a time when there are perhaps more economic conservatives and libertarians in think tanks, at law schools, and on the Supreme Court than at any time since the early 1930s when *Lochner* was widely followed, one would expect to find at least some of them disposed to defend the proposition that liberty of contract stands among the individual rights protected against limitation by the states under the Due Process Clause. Within the academia, for example, Richard Epstein, James Ely, David Bernstein, Alan Meese, David Strauss, and Randy Bartlett have come to *Lochner*'s defense in recent years.⁸⁶ Second, some mainline or liberal legal scholars who favor using the Due Process Clause to protect un-enumerated social or political rights (perhaps including privacy) have shown some willingness to rethink *Lochner*'s use of it to protect an un-enumerated economic right.⁸⁷ "A case that is right about the existence of

80. *Id.* at 53.

81. See Matthew S. Bewig, *Lochner v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and the Constitution*, 38 AM. J. LEGAL HIST. 413, 417 (1994).

82. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

83. *Id.* at 76.

84. *Id.* at 75.

85. 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 64 (1991).

86. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (Univ. of Chi. Press 2011); RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (Cato Inst. Publ'g 2006); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003); Alan J. Meese & Nate B. Oman, *The End of an Idea: Progressive Constitutionalism Is a Dead End*, NATIONAL REVIEW ONLINE (July 5, 2010, 4:00 AM), <http://www.nationalreview.com/articles/243396/end-idea-alan-j-meese> (last visited Oct. 21, 2011).

87. See Greene, *supra* note 75.

unenumerated rights but wrong about just what substantive due process guarantees seems a poor candidate for the anticanon,” Jamal Greene concluded in the forthcoming *Harvard Law Review* article.⁸⁸ Others have made similar comments.

As we consider the arguments contained in the five main articles published in this symposium issue of the *Pepperdine Law Review*—each one condemning a different opinion to the anti-canon of American law—perhaps the absence of *Lochner* should give us a reason to reflect on the defenses raised by the respondents. Although I cannot presently conceive of how some of these decisions could ever be redeemed, I would have said the same thing about *Lochner* during my law school days. But then I have heard that even Stalin is undergoing something of a rehabilitation in Russia and Jean-Claude Duvalier has been welcomed back to Haiti. One never knows how time will change one’s perspectives.

88. *Id.* at 39.
